

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
July 22, 2008 Session

**MICHAEL LEE PEARSON v. SANDRA KAY PEARSON**

**Appeal from the Circuit Court for Hamilton County  
No. 06D-1036     Jacquelyn M. Schulten, Judge**

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**No. E2007-02154-COA-R3-CV - FILED OCTOBER 27, 2008**

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After fifteen years of marriage, Michael Lee Pearson (“Husband”) sued Sandra Kay Pearson (“Wife”) for divorce. Wife answered the complaint and filed a counter-claim for divorce. After trial, the Trial Court entered an order, *inter alia*, granting the parties a divorce, entering a Permanent Parenting Plan with regard to the parties’ two minor children (“the Children”), and reserving the issue of alimony. After a further hearing, the Trial Court entered an order, *inter alia*, ordering Husband to pay Wife alimony in solido of \$1,500 per month for six years and ordering Husband to pay for COBRA insurance coverage for Wife for eighteen months as alimony in solido. Husband appeals raising issues regarding visitation, child support, division of the marital estate, and alimony. We modify the designation of alimony such that the alimony in solido of \$1,500 per month for six years shall be designated as transitional alimony but shall remain at the same amount for the same duration. We affirm the remainder of the Trial Court’s judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Modified, in part; Affirmed, in part; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, SP. J., joined.

Selma Cash Paty, Chattanooga, Tennessee for the Appellant, Michael Lee Pearson.

John R. Morgan, Chattanooga, Tennessee for the Appellee, Sandra Kay Pearson.

## **OPINION**

### **Background**

Husband sued Wife for divorce alleging inappropriate marital conduct or irreconcilable differences. Wife answered the complaint and filed a counter-claim alleging that Husband was guilty of inappropriate marital conduct and also claiming that the parties had irreconcilable differences. The Trial Court entered a Temporary Parenting Plan that, among other things, named Wife as the primary residential parent and provided that Wife and Husband would share parenting time equally. Specifically, the Temporary Parenting Plan provided that Husband would have the Children from 5:00 p.m. on Thursday through Monday morning every other week and from 5:00 p.m. on Tuesday through Friday morning every other week. The case proceeded to trial.

Husband, who was thirty-nine years old at the time of trial, holds an MBA and works for Lansing Building Products. Husband obtained his MBA after the parties married. Husband started with Lansing around 1992 as a sales representative making approximately \$35,000 per year. After about two years, Husband became a branch manager and his income increased. He was a branch manager for approximately ten years, and during that time Husband's salary went from approximately \$40,000 to \$70,000. Husband also earns an annual bonus based upon sales. The parties' 2006 federal income tax return shows Husband's wages were \$181,728. Husband's W-2 for 2005 shows Husband's wages as \$192,955.46. Husband was promoted to the position of regional manager, but went back to a position as a branch manager in May of 2006, the same month he filed for divorce. Husband testified at trial that he earns a base pay of around \$90,000 and also receives an annual bonus. Husband's bonus for 2006 was approximately \$18,000. Husband testified that he would "be lucky and happy to earn" \$100,000 as his total income for 2007 including base pay and bonus. When asked about how the change from regional manager back to being a branch manager effected his pay Husband stated: "They didn't change my base pay. I mean, they realized that, that my total compensation is not going [to] change whether or not they give me a higher base pay or a lower, so they did not change my base pay back to 70,000, where it was as a branch manager. They left it where it is at 92' just because it really doesn't make a difference in the end because it's the same amount at the end of the year."

Husband was questioned at trial about his having an affair with another woman. In response to this questioning, Husband admitted at trial that he had been having an affair with another woman for about one year.

Wife, who was thirty-eight at the time of trial, was a stay-at-home mother during most of the marriage. Wife has a GED and her employment history during the marriage included working for approximately two months as a greeter at a furniture store making around minimum wage, working during one Christmas season at Parisian, and working for a few months at Gymboree making displays in order to get a discount on merchandise. Wife also did some babysitting for friends. The parties' have two minor children born of the marriage, and Wife also has a child ("Wife's Daughter") from a previous relationship. Wife's Daughter was three years old when the

parties married, has spinal muscular atrophy, and was raised by Wife and Husband. Wife's Daughter was an adult at the time of trial, but still was living with Wife.

Wife has no income. She testified she "was looking into ways I could still be with my children in the same capacity, which would - - which would be home-based businesses." Wife testified she cannot take a job from 8 a.m. to 5 p.m. because she has to be home to take care of her daughter whom Wife can only leave "probably up to four hours at a time, where I can get her settled and she's good for a while." Wife stated:

I have been looking for a way to earn money to supplement my - - the child support and alimony, that would enable me to continue being there for my children in the same capacity that I have always been, because I feel they need me now more than they needed me then.

And I want to be there for them. I don't want to lose them and make them a statistic that I learned about in the parenting plan.

Prior to the marriage, Wife worked with social services in the child support division in Virginia. Wife testified that she has plans to sell cosmetics at home parties and to sell bread that she bakes at home.

Husband holds a 50% interest in Lookout Real Estate ("Lookout"), which was formed approximately four years before trial by Husband and Phillip Chandler to invest in and buy rental properties. At the time of trial, Lookout held eight properties, which were all listed for sale at around \$60,000 each. Philip Chandler testified:

We've definitely had to put money in, so it's become more of a good tax benefit than it is as far as actually making cash out of it. [Husband] and I have both had to put money into it over the last couple of years for vacancies, people tearing up the houses and stuff like that. So it's definitely not been a good investment on our part. You know, right now we're hoping to break even.

Mr. Chandler testified that his opinion is that the value of Lookout is zero. Husband also testified that Lookout has no value. However, on a 2005 financial statement, Husband listed the value of his interest in Lookout at \$62,000.

Husband was involved in an automobile accident in 1999, and Husband and Wife filed a personal injury lawsuit. As a result of that suit, they received a settlement of approximately \$275,000, a portion of which was used to pay their attorney's fees and expenses. The check for the settlement was made payable to Husband and Wife and both parties went to the bank and deposited the money. Husband and Wife used part of the settlement money to pay marital bills including credit card bills and to pay off a home equity line used to build a swimming pool. Husband also loaned some of this money to his father, who later repaid Husband. Husband then moved the remaining money, which Husband stated was "around \$100,000," into an account in his name alone. When asked about the timing of his removal of the remaining money, Husband stated, "[o]nce everything

was paid, it would have been less than a month later probably, two or three weeks.” When asked why he moved this money, Husband stated:

because we’ve had marital problems for years and she’s threatened - - her threat has always been to - - basically I’d be paying a lot of child support and paying her alimony and I would not be able to see the kids very often, is what she’s threatened me for years. That’s why I did that.

Husband further testified:

I know when I was going to take it and deposit - - open up - - invest it, we discussed briefly - - we didn’t discuss much, because over the years when we would get in an argument, she would always threaten how much child support and alimony I would be paying her. And I had made reference to that, and she said that she would never try to take that money, that that was money from the accident that I had gotten, that’s for my injuries and that she wouldn’t try to do that.

Husband was asked whether Wife knew where he was putting the money prior to his moving it and he stated: “I think when I went to Bank of America and opened up this account, when I came home and told her that I did, she was a little annoyed and surprised because she thought I would have told her before I went and did it.”

When asked about the settlement money, Wife testified:

I just remember going to the bank and depositing it together. I remember this because they were questioning where the money came from. That’s the only reason I think I remember that. The bank wanted to know where we got the money, and what it was from, and [Husband] got really mad because he told them it was none of their business.

And anyway, the testimony that he has spoken and said is completely not true. He said that I went home and said, [Husband], I will never take this money from you, and that is a conversation that never took place. I have never thought about divorcing my husband, and I never thought about the possibility of us not being together some day.

Wife testified that some of the money from the settlement was used to pay off marital bills and to pay for a swimming pool and stated:

then [Husband] told me he wanted to invest the rest for our retirement, and so that was pretty much the extent of his discussion with me. And he just did what he did with it, without ever discussing it with me.

And I was very upset about it because I wanted to be a part of this too, you know, of deciding what we did with this money. And he had put it into these stocks

he had purchased through somewhere, and he - - when I found out it was entirely in his name, it was very upsetting because I - - it just - - I didn't understand why he would do that.

Husband testified regarding the Temporary Parenting Plan, which gave him three days one week and four the next with the Children stating:

I think it's working out good. The children have become adjusted to it now. At first I think it was difficult because they didn't know where they were going to be on which days and it was, you know, it was hard on them. Just the whole circumstances was hard, you know, in addition to them, you know - - and at first it was tough on them because at my apartment I didn't have any of the little comforts that they were used to at [Wife's] house.

Husband testified that during this school year, the Children "missed quite a bit of school and their grades, their grades, I think, is a direct result of their attendance." At the time of trial, both children were attending summer school. Husband testified that when he had the Children:

They were in school. I mean, they, as kids, will sometimes not feel like going to school and it's hard to make them go to school, especially when they tell you that they don't feel good or that they're sick, but, you know, I always - - if they were truly sick, I would not make them go to school. But in their pleadings with me, don't make me go to school, my stomach hurts or something else, I mean, it's typical excuses children use.

Husband testified that his work schedule is:

very flexible. I mean, as a branch manager I can come in - - I can really come in whenever I want to and leave whenever I want....

Over the last six months, with having [the Children], that's been very flexible. The days that I do have them, I don't go into work until after I take them to school and then I can pick them up after school without a problem. So it's been very flexible and it's been - - really, when I took - - I couldn't have a better job for the circumstances than what I have now as far as the flexibility with the children.

Wife testified that the Children:

[have] lost 100 percent interest in school. They don't want to do anything anymore. They want to retreat. They want to retreat into video games and the computer, and they just are so different than what they were a year ago.

And I just think this whole deal of them going back and forth, even though I know what they're dealing with, of their parents not being together is hard, and just

- - in itself, the temporary parenting plan, I feel like, increased the difficulty in their ability to deal with things.

Wife further testified:

[the Children] do not have a bedtime when they're with [Husband]. They're not on a schedule. There's no structure. There's - - [the older child] is falling asleep in class because he stays up half the night. I would call to say goodnight to them at 10:00, and [the younger child's] already in bed by his own self, putting him to bed, not because his dad told him to, and [the older child] would still be up on the computer, playing games.

And this has become more and more frequent. Through the school year it became more and more frequent. And I could see him - - when he would come home, he would look exhausted, and I'm like [older child], are you - - well, I would ask him, are you staying up all night. And he would answer me.

And, you know, they were becoming increasingly, through the last few months, not really emotionally distraught over everything, but their lack of sleep and their lack of structure just increased and intensified the situation and made it even harder for them.

Wife also testified:

Their school performance diminished greatly. [The younger child] has always been a very, very good student, testing above average through the years on all his, like the TCAP tests and all that. He - - his grades dropped significantly. It was a shock to see his first report card. I mean, it - - and they just struggled the entire school year.

And I attribute that to, one, their emotional state. They were kind of - - well, they just couldn't concentrate. It's like they couldn't focus, they had so much on them.

And, of course, after [Husband] left us, it seemed to become increasingly worse. I think prior to him leaving, it was just this constant wondering, what's going on. [Husband] never talked to them. He wouldn't tell them things that were happening. We were still building our house, we were still living together, and he wouldn't talk to them about what's happening, and you know, I think that was part of - - the first part of the year had a lot to do with it.

And then the second was them dealing with the fact that, this is really happening.

And then the parenting plan, I think, further contributed to their state of mind and how they were in school and how they - - how well they did in school.

Wife testified that both of the Children are on probation, have to take summer classes, and that they are taking an on-line or virtual school program. She stated:

And [the older child] has struggled greatly with this virtual school. He just lacks the self-discipline and the motivation to make himself do it. I would - - you know, and his habits have made this also increasingly difficult.

[The older child] wants to stay up all night and then sleep half the day, and I won't let him. He has to be in bed by midnight when he's with me. There are times where I've woken up at 2:00 because I heard something, and he's gotten back up and was doing something, saying I can't sleep. I mean, this is a regular occurrence in our home, where he and I - - it's a constant struggle, you need to go to bed, you need to get your sleep so you can do your school, you know.

And when he's been with [Husband], his teacher called me and said - - he had been with [Husband] for several days, and he had not even logged on the first time on his virtual school. And so he's - - he's falling behind, or he was.

Sunday night I told him that this week it's kind of do or die with this school thing. You know, you either get it done or you fail. I mean, this is your last chance.

\* \* \*

So he worked Monday and Tuesday all day long on his school, and he got a significant amount accomplished, and I believe what helped is I made him go to bed early the nights before, and I made him get up early, and I made - - and I brought his computer down to the kitchen table and made him sit there so I could make sure he wasn't doing other things.

When Wife was asked about the parenting plan she proposed, she stated:

I want our children to have a good relationship with their father. I feel like it's very important.

As far as living, where they live, I feel that it's a very good plan. As far as them spending time with him, I would encourage him to, you know, come take them for a walk or go play racquetball or whatever on nights where they would be able to, aside from doing their homework and any other activities.

Wife testified that when they started the temporary parenting plan approximately six months before trial, they had to make adjustments during the first two months because Husband "had a sales meeting for a week. He took a trip to Hawaii, and he - - various other things, and various

reasons he did not get the boys on the scheduled times that he was told by the judge that he could have them.”

After trial, the Trial Court entered an order in July of 2007, *inter alia*, granting the parties a divorce, entering a Permanent Parenting Plan, dividing the marital property, and reserving the issue of alimony for further ruling after a determination of the proper amount of child support under the guidelines. In the Permanent Parenting Plan, the Trial Court, *inter alia*, named Wife the primary residential parent and gave Husband parenting time during the school year on alternating weekends from Friday at 5:00 p.m. until Sunday at 5:00 p.m., and on the week he has no weekend visitation on Thursday from 5:00 p.m. until 8:30 p.m. In dividing the marital property, the Trial Court found and held, among other things, that the settlement money from their lawsuit which Husband claimed was his separate property was marital property and that the value of Lookout was \$40,000. The Trial Court awarded Husband approximately \$225,800 of the marital estate and Wife approximately \$226,900.

After further hearing, the Trial Court entered a Final Judgment of Divorce in August of 2007, finding and holding, *inter alia*, that Husband was to pay \$281.68 per month for the next eighteen months for COBRA insurance coverage on Wife as alimony in solido, and that Husband was to pay Wife alimony in solido of \$1,500 per month for six years. Husband filed a motion to alter or amend, which the Trial Court denied. Husband appeals to this Court.

### **Discussion**

Although not stated exactly as such, Husband raises four issues on appeal: 1) whether the Trial Court erred in setting parenting time; 2) whether the Trial Court erred in classifying and dividing the marital property; 3) whether the Trial Court erred in awarding Wife alimony in solido; and, 4) whether the Trial Court erred in computing child support without imputing any income to Wife. Wife raises no additional issues. Husband asks by motion that this Court take notice of the post-judgment fact that Wife’s Daughter, who was living with Wife at the time of trial, no longer lives with Wife. Husband’s motion to consider post judgment facts is denied.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first address whether the Trial Court erred in setting parenting time. We review a trial court’s decisions regarding custody and visitation for abuse of discretion. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). As our Supreme Court has instructed:

It is not the function of appellate courts to tweak a visitation order in the hopes of achieving a more reasonable result than the trial court. Appellate courts correct errors. When no error in the trial court’s ruling is evident from the record, the

trial court's ruling must stand. This maxim has special significance in cases reviewed under the abuse of discretion standard. The abuse of discretion standard recognizes that the trial court is in a better position than the appellate court to make certain judgments. The abuse of discretion standard does not require a trial court to render an ideal order, even in matters involving visitation, to withstand reversal. Reversal should not result simply because the appellate court found a "better" resolution. See *State v. Franklin*, 714 S.W.2d 252, 258 (Tenn. 1986) ("appellate court should not redetermine in retrospect and on a cold record how the case could have been better tried."); cf. *State v. Pappas*, 754 S.W.2d 620, 625 (Tenn. Crim. App. 1987) (affirming trial court's ruling under abuse of discretion standard while noting that action contrary to action taken by trial court was the better practice); *Bradford v. Bradford*, 51 Tenn. App. 101, 364 S.W.2d 509, 512-13 (1962) (same). An abuse of discretion can be found only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record. See, e.g., *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000).

*Id.* at 88.

Husband argues, in part, that the *Eldridge* "decision is seven years old and should be reversed." Husband also argues that "to deprive [Husband] of his constitutional right to have substantially equal residential time is an abuse of discretion when the trial judge failed to make a finding that it was not in the best interest of the children to be with both parents a substantially equal amount of time."

This Court lacks the authority to rewrite the law as determined by our Supreme Court. Unless and until our Supreme Court or our Legislature determines that the rule in *Eldridge* should be reversed, this constitutes the law in Tennessee. Further, Husband is mistaken as to his assertion that absent a finding that it was not in the Children's best interest, Husband is entitled to substantially equal residential time. As our Supreme Court clearly instructed:

When no error in the trial court's ruling is evident from the record, the trial court's ruling must stand....An abuse of discretion can be found only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.

*Id.*

A careful and thorough review of the record on appeal reveals no reversible error in the Trial Court's ruling as to the parties' parenting time. The evidence shows that the Children were having difficulties in school when the parties were adhering to a residential schedule such as the one Husband requested. The Trial Court's ruling did not fall outside the spectrum of rulings that would reasonably result given the evidence in the record and the application of the correct legal standards. We find no abuse of discretion in the Trial Court's ruling regarding custody and visitation.

We next address whether the Trial Court erred in classifying and dividing the marital property. Husband contends that the Trial Court erred in classifying the settlement money from their lawsuit as marital property and in valuing Lookout and that these errors render the overall distribution of marital property inequitable.

In an action for divorce, a Trial Court may “equitably divide, distribute, or assign” only the marital property, not separate property. Tenn. Code Ann. § 36-4-121(a)(2) (2005). Before distributing marital property, the trial court first must identify all of the property and then classify it as either marital or separate. *Keyt v. Keyt*, 244 S.W.3d 321, 328 (Tenn. 2007). Courts must look to Tenn. Code Ann. § 36-4-121 when determining how to distribute property in a divorce. In pertinent part, Tenn. Code Ann. § 36-4-121 provides:

(b) For purposes of this chapter:

(1)(A) “Marital property” means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing . . . .

(B) “Marital property” includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation, . . . .

\* \* \*

(D) As used in this subsection (b), “substantial contribution” may include, but not be limited to, the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine.

\* \* \*

(2) “Separate property” means:

(A) All real and personal property owned by a spouse before marriage;....

\* \* \*

(E) Pain and suffering awards, ....

\* \* \*

(c) In making equitable division of marital property, the court shall consider all relevant factors including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties. . . .

Tenn. Code Ann. § 36-4-121 (2005).

A trial court has wide discretion in dividing the interest of the parties in marital property. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991). As noted by this Court in *King v. King*, when dividing marital property:

The trial court's goal in every divorce case is to divide the parties' marital estate in a just and equitable manner. The division of the estate is not rendered inequitable simply because it is not mathematically equal, *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn. 1988), or because

each party did not receive a share of every item of marital property. *Brown v. Brown*, 913 S.W.2d [163] at 168. . . . In the final analysis, the justness of a particular division of the marital property and allocation of marital debt depends on its final results. *See Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. App. 1990).

*King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (quoting *Roseberry v. Roseberry*, No. 03A01-9706-CH-00237, 1998 Tenn. App. LEXIS 100, at \*11-12 (Tenn. Ct. App. Feb. 9, 1998), *no appl. perm. appeal filed*).

Husband argues that the Trial Court erred in distributing as part of the marital property the settlement money remaining from their lawsuit. In pertinent part, Tenn. Code Ann. § 36-4-121 provides that separate property includes “[p]ain and suffering awards ....” Tenn. Code Ann. § 36-4-121(b)(2)(E) (2005). Husband argues that the settlement money that he transferred into the account solely in his name was his separate property because it was for his pain and suffering, future loss of wages, future medical bills, and his permanent impairment.

Our Supreme Court discussed the concepts of marital property and separate property in *Langschmidt v. Langschmidt* and noted that in addition to the statutory provisions contained in Tenn. Code Ann. § 36-4-121(b), Tennessee intermediate appellate courts have recognized two methods by which separate property may be converted into marital property. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002). These two methods are commingling and transmutation, which the Supreme Court noted have been described by this Court as follows:

[S]eparate property becomes marital property [by commingling] if inextricably mingled with marital property or with the separate property of the other spouse. If the separate property continues to be segregated or can be traced into its product, commingling does not occur.... [Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property.... The rationale underlying these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. This presumption is based also upon the provision in many marital property statutes that property acquired during the marriage is presumed to be marital. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

*Langschmidt*, 81 S.W.3d at 747 (citations omitted).

The evidence shows that during the marriage Husband was involved in an automobile accident that resulted in a lawsuit and that Husband and Wife received a settlement of \$275,000 as a result of this suit. The evidence further shows that after paying their attorney’s fees and costs, Husband and Wife deposited this money and then used a portion of it to pay off marital bills and pay off a home equity line used to build a swimming pool at their home. Thus, a presumption was raised

that both Husband and Wife either commingled the settlement funds with the marital funds already in the account into which the settlement funds were deposited, or transmuted the money into marital property by using it to pay down marital bills and the home equity line.

Although Husband testified that he told Wife that the settlement would remain his separate property, Wife strenuously denied this assertion. “When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings.” *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999) (quoting *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn.1998)). Clearly, the Trial Court found Wife more credible on this issue.

Further, the personal injury lawsuit that was settled included claims both of Husband and of Wife. In the record before us, there is no breakdown between Husband’s claims and Wife’s claims as to the settlement proceeds. It is impossible to know from this record what portion of the settlement was for Husband’s claims and what portion was for Wife’s claims. What is clear from the record is that these parties treated the total settlement proceeds as marital property until Husband unilaterally moved an amount to an account solely in his name. We also note that as to this particular asset, the remaining settlement funds in the account solely in Husband’s name, the Trial Court awarded Husband over \$20,000 more than was awarded to Wife. Husband did receive a greater portion of this particular asset than did Wife.

Husband failed to rebut the presumption that years ago his share of the personal injury settlement, as had Wife’s, either had been inextricably commingled or had become transmuted from separate property into marital property. We find no error in the Trial Court’s classification of the settlement money remaining from the parties’ lawsuit as marital property.

Husband also argues that the Trial Court erred in assigning a value of \$40,000 to his interest in Lookout. In *Owens v. Owens*, this Court discussed values placed on marital property by a trial court as follows:

After a trial court has classified the parties’ property as either marital or separate, it should place a reasonable value on each piece of property subject to division. *Davidson v. Davidson*, No. M2003-01839-COA-R3-CV, 2005 WL 2860270, at \* 2 (Tenn. Ct. App. Oct. 31, 2005) (No Tenn. R. App. P. 11 application filed). *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at \*11 (Tenn. Ct. App. May 13, 2003) (No Tenn. R. App. P. 11 application filed). The parties themselves must come forward with competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998); *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values represented by all the relevant valuation evidence. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997); *Brock v. Brock*,

941 S.W.2d 896, 902 (Tenn. Ct. App. 1996). Decisions regarding the value of marital property are questions of fact. *Kinard v. Kinard*, 986 S.W.2d at 231. Accordingly, they are entitled to great weight on appeal and will not be second-guessed unless they are not supported by a preponderance of the evidence. *Smith v. Smith*, 93 S.W.3d at 875; *Ray v. Ray*, 916 S.W.2d 469, 470 (Tenn. Ct. App. 1995).

*Owens v. Owens*, 241 S.W.3d 478, 486 (Tenn. Ct. App. 2007).

Husband argues that the only evidence presented was that Lookout had a value of zero. Husband is mistaken. While it is true that Husband and his partner, Mr. Chandler, both testified that in their opinion the value of Lookout was zero, this was not the only evidence presented regarding this issue. Evidence was presented that at the time of trial, Lookout held eight properties that were listed for sale at \$60,000 each. Evidence also was presented that in 2005, Husband placed a value of \$62,000 on his interest in Lookout on a financial statement. The Trial Court found that Lookout had a value of \$40,000, an amount that was “within the range of the values represented by all the relevant valuation evidence.” *Id.* The evidence does not preponderate against the Trial Court’s valuation.

We hold that the Trial Court did not err in finding that the remaining money from the personal injury settlement was marital property, nor did the Trial Court err in assigning a value of \$40,000 to Husband’s interest in Lookout. Given this, and our careful and thorough review of the record on appeal, we find no error in the Trial Court’s equitable distribution of the marital property.

We next consider whether the Trial Court erred in awarding Wife alimony in solido. As our Supreme Court has instructed:

Trial courts have broad discretion in awarding spousal support. *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004). “Accordingly, ‘[a]ppellate courts are generally disinclined to second-guess a trial judge’s spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes.’” *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001) (quoting *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998)). The role of an appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable. *Id.* at 733. Thus, this Court gives awards of alimony an abuse of discretion review. *See Bratton*, 136 S.W.3d at 605.

*Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006).

Husband argues, in part, that the Trial Court “erred in making the alimony ‘in solido’, which is contrary to the legislature’s direction that alimony should be rehabilitative when feasible,” and that Wife, who was thirty-eight years old at the time of trial “has no acceptable reason for not working.”

We agree with Husband that the record is devoid of evidence showing that Wife is unable to obtain a job, or incapable of working. The economic reality is that Wife will have to find a way to earn an income in order to help support herself. The record on appeal reveals that Wife is a young woman in good health. Although Wife testified that she had developed blood clots in her legs when she gave birth to one of the Children and that she takes a blood thinner daily, she admitted that no doctor had told her she was unable to work. However, Wife is economically disadvantaged compared to Husband. Wife's earning capacity at the time of trial clearly was less than Husband's as Wife had only a GED and little work experience compared to Husband's MBA and years of work history.

Unfortunately for Husband, the record is devoid of any evidence regarding Wife's rehabilitation, either Wife's desire or her capacity to be rehabilitated to allow Wife "to achieve, with reasonable effort, an earning capacity that will permit [Wife's] standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to [Husband]...." Tenn. Code Ann. § 36-5-121 (e)(1) (2005). Given this lack of evidence in the record on appeal, we are unable to hold that Wife should receive rehabilitative alimony rather than alimony in solido. Fortunately for Husband, Wife raises no issues as to either the amount or the duration of the alimony. However, we find that the alimony award of \$1,500 per month for six years should more properly have been classified as transitional alimony which, "is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce...." Tenn. Code Ann. § 36-5-121(g)(1) (2005).

Husband also argues that the Trial Court "failed to consider [Wife's] earning capacity and what she can make," and that "[a]t the very least in fixing the amount of alimony, the Court should have found that [Wife] could earn minimum wage of no less than \$5.85 an hour, or \$1,014 a month." As we noted above, Wife will need to earn an income to help provide for her own support, and the record is devoid of evidence showing that she will be unable to do so. The record on appeal shows that Wife demonstrated a monthly need of \$4,500. Even adding up the amount of alimony as awarded, the child support that Husband was ordered to pay to Wife, and a minimum wage income of \$1,014 per month as argued by Husband, Wife's proven need still outweighs her income. Wife has shown a need and Husband has the ability to pay. We find no error in the amount and duration of the award of \$1,500 per month for six years.

We modify the alimony award such that the designation of the award of \$1,500 per month for six years shall be transitional alimony, and affirm the amount and duration of the Trial Court's award. The award of alimony in solido of \$281.68 per month for eighteen months for continuing Wife's COBRA insurance shall remain as alimony in solido at the same amount and for the same duration.

Finally, we address whether the Trial Court erred in computing child support without imputing income to Wife. Husband's argument, in essence, centers around the fact that the Trial Court failed to find Wife willfully unemployed and failed to impute income to Wife. As this Court explained in *Richardson v. Spanos*:

Prior to the adoption of the Child Support Guidelines, trial courts had wide discretion in matters relating to child custody and support. *Hopkins v. Hopkins*, 152 S.W.3d 447, 452 (Tenn. 2004) (Barker, J., dissenting). Their discretion was guided only by broad equitable principles and rules which took into consideration the condition and means of each parent. *Brooks v. Brooks*, 166 Tenn. 255, 257, 61 S.W.2d 654, 654 (1933). However, the adoption of the Child Support Guidelines has limited the court's discretion substantially, and decisions regarding child support must be made within the strictures of the Child Support Guidelines. *Berryhill v. Rhodes*, 21 S.W.3d 188, 193 (Tenn. 2000); *Jones v. Jones*, 930 S.W.2d 541, 545 (Tenn. 1996); *Smith v. Smith*, 165 S.W.3d 279, 282 (Tenn. Ct. App. 2004).

\* \* \*

Because child support decisions retain an element of discretion, we review them using the deferential “abuse of discretion” standard. This standard is a review-constraining standard of review that calls for less intense appellate review and, therefore, less likelihood that the trial court's decision will be reversed. *State ex rel Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999). Appellate courts do not have the latitude to substitute their discretion for that of the trial court. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Thus, a trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001), and reasonable minds can disagree about its correctness. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Discretionary decisions must, however, take the applicable law and the relevant facts into account. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). Accordingly, a trial court will be found to have “abused its discretion” when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003); *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).

*Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005).

As pertinent to this issue, the applicable Child Support Guidelines provide:

(i) Imputing additional gross income to a parent is appropriate in the following situations:

(I) If a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed; or

(II) When there is no reliable evidence of income; or

(III) When the parent owns substantial non-income producing assets, the court may impute income based upon a reasonable rate of return upon the assets.

(ii) Determination of Willful and/or Voluntary **Underemployment** or Unemployment.

The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed. The purpose of the determination is to ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and to determine whether such choices benefit the children.

(I) A determination of willful and/or voluntary under or unemployment is not limited to occupational choices motivated only by an intent to avoid or reduce the payment of child support. The determination may be based on any intentional choice or act that affects a parent's income.

(II) Once a parent that has been found to be willfully and/or voluntarily under or unemployed, additional income can be allocated to that parent to increase the parent's gross income to an amount which reflects the parent's income potential or earning capacity, and the increased amount shall be used for child support calculation purposes. The additional income allocated to the parent shall be determined using the following criteria:

I. The parent's past and present employment; and

II. The parent's education and training.

\* \* \*

(iii) Factors to be Considered When Determining Willful and Voluntary Unemployment or **Underemployment**.

The following factors may be considered by a tribunal when making a determination of willful and voluntary **underemployment** or unemployment:

(I) The parent's past and present employment;

(II) The parent's education, training, and ability to work;

(III) The State of Tennessee recognizes the role of a stay-at-home parent as an important and valuable factor in a child's life. In considering whether there should be any imputation of income to a stay-at-home parent, the tribunal shall consider:

I. Whether the parent acted in the role of full-time caretaker while the parents were living in the same household;

II. The length of time the parent staying at home has remained out of the workforce for this purpose; and

III. The age of the minor children.

(IV) A parent's extravagant lifestyle, including ownership of valuable assets and resources (such as an expensive home or automobile), that appears inappropriate or unreasonable for the income claimed by the parent;

(V) The parent's role as caretaker of a handicapped or seriously ill child of that parent, or any other handicapped or seriously ill relative for whom that parent has assumed the role of caretaker which eliminates or substantially reduces the parent's ability to work outside the home, and the need of that parent to continue in that role in the future;....

Tenn. Comp. R. & Regs. 1240-2-4-.04 (emphasis in original).

What is necessary to be found before a court can impute income to Wife when determining her need for alimony purposes is not necessarily the same as what must be found before a court can impute income to Wife for purposes of calculating child support under the Guidelines. The Trial Court implicitly found that Wife was not willfully unemployed under the Guidelines. The evidence does not preponderate against this finding. Given this, the Trial Court was not required to impute income to Wife when calculating child support.

The record reveals that the Children were attending private school when the parties were living together. The Trial Court implicitly found that Husband had the financial ability to allow the Children to continue to attend this school. The evidence does not preponderate against this finding. Husband points out that "[t]here is no reason [Wife] cannot work just like millions of other mothers do to give their children a better standard of living." We agree. We note that under the Trial Court's order, Husband was required to pay the expenses for the private school tuition and Wife was required to pay "[a]ll additional fees, lunch fees, and extra-curricular school activity fees...." Thus, Wife is required to carry a portion of the burden of the Children's school expenses. We find no error in the Trial Court's refusal to impute income to Wife when making the initial calculation of child support, which included a deviation for private school tuition.

### **Conclusion**

The judgment of the Trial Court is modified such that the alimony of \$1,500 per month for six years shall be designated as transitional alimony. The remainder of the Trial Court's judgment is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Michael Lee Pearson, and his surety.

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D. MICHAEL SWINEY, JUDGE